MARGRET CHIWIMBISO MWAMUKA N.O
(in her capacity as executrix dative Estate late VN Mwamuka)
versus
JULIE PANAGIOTA MERCURI N.O
(in her capacity as executrix dative estate late E E Mercuri)
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 15-17 March, 17 July, 23 October 2017 and 24 October 2018

Civil trial

E T Matinenga with *R Kunze*, for plaintiff
T. Mpofu with *H Moyo*, for 1st defendant

CHITAKUNYE J: The plaintiff and the first defendant are both widows as they lost their husbands in tragedy circumstances at different times. The plaintiff's husband, Vernon Nathaniel Mwamuka died in a road traffic accident on 30 December 2001 whilst the first defendant's husband, Euginio Enrico Mercuri, was killed by armed robbers at his house on 16 March 2008.

During their lifetime the two, Vernon Nathaniel Mwamuka and Euginio Enrico Mercuri, were in an architectural partnership wherein they were equal partners, under the name Mwamuka, Mercuri and Associates.

At the demise of V N Mwamuka on 30 December 2001, the partnership by operation of law was terminated. However, the remaining partner did not attend to the winding up of the affairs of the partnership by preparing the partnership accounts and according to each partner their 50% share until his death. After the demise of Enrico E Mercuri on 16 March 2008 the first defendant, as executrix found herself having to deal with her late husband's affairs. The same scenario had earlier on befallen plaintiff who upon being appointed executrix of estate late V N Mwamuka, on 28 July 2004, had to deal with her late husband's interests in the partnership.

After being appointed executrix on 28 July 2004, the plaintiff on 1 0ctober 2008 granted a Power of Attorney to Arafas Mtausi Gwaradzimba of AMG Global Chartered Accountants Zimbabwe. With the said power of attorney A M Gwaradzimba proceeded to refer to himself in his dealings with 1st defendant and others, as the executor of the estate late Vernon Nathaniel Mwamuka. In that regard he purported to enter into negotiations and agreements with 1st defendant in his own capacity as executor of the estate late V N Mwamuka. This was clearly wrong as the Power of Attorney clearly stated that Margret Mwamuka, in her capacity as executrix, was appointing A M Gwaradzimba as her agent.

In terms of the Administration of Estates Act, [*Chapter 6:01*] a legal representative of a deceased estate is a duly appointed executor and not any one purporting to be such. The anomaly of Mr Gwaradzimba portraying himself as executor persisted despite the fact that plaintiff and Mr. Gwaradzimba were in constant engagement with legal practitioners on behalf of the estate. Even the summons in this case was issued in the name of 'Arafas Mtausi Gwaradzimba in his capacity as executor dative of the estate of the late V N Mwamuka'. It was only later on that an application to amend the citation of the parties was made. After a contested hearing the application was duly granted. It was my view that the plaintiff's legal practitioners could easily have avoided the expensive route of amendment had they confirmed with Mr Gwaradzimba whether he had indeed been appointed executor and requested for letters of appointment. Such request should be routine whenever someone purports to be representing a deceased estate.

As the two widows battled for what was left behind by their respective husbands they found themselves unable to agree on a number of issues. As a consequence on 15 November 2012, the plaintiff issued summons out of this court seeking, *inter alia*,

1. Payment of the sum of five hundred and twenty four thousand dollars owed by 1st defendant to the plaintiff arising from the dissolution of the partnership;

2. Interest at the prescribed rate of libor plus 6% per annum calculated from 1st May 2012 to date of full payment; and

3. Costs of suit.

In her claim plaintiff alleged, inter alia, that on 1 June 2010 the plaintiff and the first defendant entered into a distribution agreement in terms of which the partnership assets forming part of the estates were duly shared between the estate of the late Mwamuka and the estate of the late Mercuri. This however did not resolve all the issues between the estates over

the partnership. Parties continued to discuss the outstanding issues pertaining to the dissolution of the partnership and other ancillary issues culminating in an agreement in April 2012.

She alleged that in April 2012 the following was agreed in order to settle all the outstanding partnership issues:-

a) The first defendant would pay to the plaintiff a sum of $524 000.00 in full and final settlement of the relationship between the erstwhile partners, and that the amount was due, owing and payable;

b) The above sum would accrue interest at the rate of libor plus 6% per annum, calculated from the 1st May, 2012, to date of payment, both dates inclusive; and

c) The said sum would be paid within reasonable time.

The plaintiff thus alleged that in breach of the agreement of April 2012, the first defendant failed to pay the sum of $524 000-00 plus accrued interest.

The first defendant in her plea contended that the partnership was dissolved on 30 December 2001 when the late Mwamuka died by operation of law and that plaintiff's cause of action arose then. The plaintiff's claim filed on 16 November 2012 was thus prescribed as it was launched more than 3 years after it arose.

On the merits, the first defendant contended that the distribution agreement of 1st June 2010 was not valid as it was brought about as a result of the systematic application of coercion, duress and undue influence upon the first defendant.

As regards the alleged agreement of April 2012, the first defendant denied that she entered into such an agreement agreeing to the payment of $524 00-00 plus interest. She thus denied the existence of that agreement alternatively that its validity was tainted by duress.

She also contended that no proper parties were cited in the purported two agreements as Afarasi Mtausi Gwaradzimba purported to execute the agreements in his capacity as executor of the estate late Mwamuka, when he was never appointed as such. The said A M Gwaradzimba was only an agent of the Executrix.

The first defendant raised other issues affecting the validity of the purported agreements including the fact that at the time of the alleged negotiations there was an illegal specification order against estate late Mercuri in violation of the provisions of the Prevention of Corruption Act, [*Chapter 9:16*]

The first defendant on her part made a counter claim in which she sought an order:

1) Declaring the distribution agreement entered into between the representatives of estate Late Mercuri and Estate Late Mwamuka and signed by the parties on the 1st June 2010, null and void and of no force or effect;
2) That all purported contracts, deeds of compromise, concessions and other purported agreements of whatever nature whether oral or written and purported by Estate Late Mwamuka to be enforceable against Estate Late Mercuri, be and are hereby declared null and void and of no force or effect whatsoever;
3) That any transfers or change of registration of ownership executed in pursuance of any such purported agreement, concessions, compromises of whatever nature in purported settlement of the ongoing dispute between Estate Late Mercuri and Estate Late Mwamuka be and are hereby ordered to be reversed by Plaintiff at the sole expense and effort of Estate late Mwamuka;
4) That the two deceased estates of the late Messrs Euginio Enrico Mercuri and Vernon Nathaniel Mwamuka be dealt with and settled through the oversight of the Master of the High Court in accordance with generally accepted accounting practices and procedures and as provided for in the Administration of Estates Act and other applicable laws;
5) That Plaintiff in the main action bears the costs of this action on the legal practitioner and client scale.

As was expected plaintiff opposed the claim in reconvention contending that such counter claim be dismissed with costs.

At a pre-trial conference held in June 2015 the issues referred for trial were couched as follows:-

Main claim

1. Whether any agreement was concluded between the Plaintiff and first defendant for payment to the Plaintiff by first defendant of the sum of US$524 000.00 with interest at libor plus 6% per annum calculated with effect from 1st May 2012 as alleged by the plaintiff or at all;
2. If so, whether the 1st defendant and her representatives entered into such agreement freely and voluntarily without any duress having been brought to bear upon her;
3. Whether the Plaintiff is entitled to the relief claimed as alleged or at all.

Counter claim

1. Whether 1st defendant and her authorized representatives acted freely and voluntarily, without any undue pressure, duress and /or undue influence having been brought to bear upon them in negotiating and signing the Distribution Agreement executed on the 1st June 2010;
2. Whether the purported distribution of the assets of the partnership of Mwamuka, Mercuri and Associates was in compliance with the provisions of the Prevention of

Corruption Act, chapter 9:16 to the extent that the 'Distribution Agreement' purported to dispose of assets of a specified person.

3. Whether the purported 'Distribution Agreement' was competently signed by or on behalf of the Estate late Mwamuka.
4. Whether 1st defendant is entitled to the relief claimed as alleged or at all.

The plaintiff gave evidence through Mr Arafas Mtausi Gwaradzimba after which the first defendant gave evidence and called one other witness.

From the evidence adduced the following emerged as common cause:

The late Vernon Nathaniel Mwamuka and the late Euginio Enrico Mercuri were in an architectural partnership known as Mwamuka Mercuri and Associates. Each had a 50% interest in the partnership as well as a 50% interest in companies they had jointly invested in. The late V N Mwamuka died in a road traffic accident on 30 December 2001. By operation of law, the partnership terminated by virtue of that death. The plaintiff was duly appointed executrix of her late husband's estate on 28 July 2004.

It is trite that at the termination or dissolution of a partnership the parties have a right to wind up the partnership by attending to the distribution of the assets and liabilities of the partnership. In the case of dissolution by death the surviving partner (party) is enjoined to wind up the estate and accord to the estate of the deceased its due share of both assets and liabilities. In *casu*, the late Mercuri did not attend to the winding up of the partnership affairs soon after the demise of the late Mwamuka. Upon her appointment as executrix of estate late Mwamuka on 28 July 2004, the plaintiff duly approached the late Mercuri for her late husband's share but none was forthcoming as the partnership had not been formally wound up. Despite this knowledge neither party took the appropriate steps for the winding up of the partnership such as approaching court after the demise of the late Mwamuka for the appointment of a liquidator

It is common cause that on 15 June 2007, the late Euginio Enrico Mercuri and Mwamuka Mercuri and Associates partnership were placed under specification in terms of the s 6(1) of the Prevention of Corruption Act, (*supra*). This was apparently at the instigation of the plaintiff. A Mr. Wesley Sibanda of AMG Global Accountants was appointed investigator.

As fate would have it, on 16 March 2008 the late E E Mercuri was killed by armed robbers at his home in Bulawayo. As at the time of his death, the Partnership though terminated by operation of law, had still not been wound up. The first defendant was duly appointed executrix of her late husband's estate.

The first defendant found herself faced with the albatross of specification as this was not revoked or lifted despite the death of the person who had been specified.

It is common cause that the two executrixes in their dealings with the estates of their respective late husbands sought the assistance of chartered accountants namely Mr. A M Gwaradzimba of AMG Global Accountants for the plaintiff and Mr. D M Cooper of Coopers and Company for first defendant.

It is further common cause that in their discussions Mr. Gwaradzimba presented himself as the executor of estate late Mwamuka hence when they purportedly reached agreement of 1st June 2010, that agreement cites his name as executor of estate late Mwamuka and the first defendant as executrix of estate late Mercuri.

When negotiations on the outstanding issues continued Mr Gwaradzimba continued with the same misrepresentation. As already alluded to even in this suit Mr Gwaradzimba had initially portrayed himself as executor estate late Mwamuka. It was only during the course of this suit that an amendment to correct the anomaly was granted by this court after a contested application, amending the names of the parties to this action to now reflect Margret Chiwimbiso Mwamuka as the executrix and deleting Mr Gwaradzimba's name.

The contested issues before me as determined at the pre-trial conference pertain mostly to the circumstances under which the distribution agreement of 1st June 2010 and the purported further negotiations which plaintiff said led to a further agreement, albeit not written, in April 2012 on the outstanding issues, were conducted. The evidence led will thus be analysed bearing in mind the real dispute between the parties as regards those aspects and the circumstances of the case.

Mr. Gwaradzimba gave evidence for the plaintiff. His evidence was to the effect that upon the late Mwamuka's death, the remaining partner, the late Mercuri did not wind up the partnership as was expected in terms of the law.

He testified that as at the time he was engaged in October 2008 he noted that the partnership had not been wound up. His mandate was thus to ascertain from the executrix of estate late Mercuri if there were partnership dissolution accounts and to assist plaintiff to get a share due to the late Mwamuka's estate.

After meeting Mrs. Mercuri it became apparent that no dissolution accounts had been prepared. Mrs. Mercuri then referred him to Mr. D.M Cooper as the person to look into the affairs of the partnership with him. Upon meeting Mr. Cooper and also exchanging correspondence they reached agreement on the distribution of assets as contained in the

Distribution agreement of the 1st June 2010. He signed that agreement as executor and 1st defendant signed also.

Mr. Gwaradzimba 's evidence on the circumstances under which this agreement was arrived at was basically that after discussions with Mr. Cooper they realised the partnership had some joint investments and they decided to deal with those investments in the distribution agreement of 1st June 2010 by sharing those assets between the two estates. The assets were evaluated by an independent evaluator Knight Frank and Rutley after which the distribution was effected as per para 2.1 of that agreement. Those assets are now owned by the respective estates.

In his evidence in chief Mr Gwaradzimba did not allude to any anomalies in the manner in which the negotiations were conducted and agreement reached. As far as he was concerned that agreement is valid despite the fact that he is cited as having represented the estate late Mwamuka in his capacity as the Executor Dative of Estate late V N Mwamuka

After the conclusion of the 2010 agreement his evidence was to the effect that negotiations continued on the outstanding issues which included the dissolution of the partnership and the sharing of the partnership's net assets as at the date of 30 December 2001. These issues were to be subject of a separate agreement. Those negotiations led to the purported verbal agreement of April 2012. As with the 1st agreement the witness gave the impression that negotiations went on well and nothing untoward came to his notice.

Under cross examination the witness was questioned about the specification that continued even after the late Mercuri's death and pressure brought to bear upon the first defendant as a result of such specification and the plaintiff's role in this regard. Certain correspondence was brought to his attention emanating from his principal and he had no option but to concede that these were not proper. The witness conceded that the estate late E E Mercuri remained under specification despite the demise of the specified person.

The first defendant's evidence on the other hand was to the effect that the distribution agreement of 2010 was not freely and voluntarily entered into as she was under duress. She was coerced into entering into that agreement with the hope that the specification that continued even after her husband's death would be lifted. She thus did not enter into that agreement of her free will.

It was her evidence that when her husband was killed by robbers she was appointed executrix of his estate. She found herself saddled with a situation whereby the specification that had been placed on her husband and the partnership continued even after his death. The

specification that had been effected in 2007, entailed that all her late husband's accounts were frozen hence she had to get authority from the investigator for whatever she needed to pay for. In some instances authority would be declined and so she had to bear the brunt of the specification order.

The first defendant narrated the circumstances that led to the distribution agreement of 1 June 2010. Her narration was to the effect that she did so under duress and her main intent was to have the specification lifted as she had been told that specification would not be lifted unless she complied with plaintiff's demands. She thus found herself having to agree to what she would ordinarily not have agreed to just so that specification can be lifted. She was also under threat of prosecution as already indicated. She referred to some correspondence which was written by her legal practitioners to the Ministers of Home Affairs and also to the investigator regarding the need to lift the specification. The response from the Ministers made it clear that specification would not be lifted unless she yielded to the demands of the executrix estate late Mwamuka. One such letter dated 6 April 2012 from The Permanent Secretary, Ministry of Home Affairs to first defendant's legal practitioners categorically stated that the Co-Ministers would not lift the Specification till specified persons comply with the recommendations by the investigator which was to pay whatever was deemed due to the estate late Mwamuka.

As there were no specific figures due to estate Late Mwamuka it meant parties were goaded into negotiating from different angles. The first defendant was negotiating figures or modalities of arriving at what would be deemed due under threat of prosecution and continued specification whilst plaintiff was negotiating with the backing of Ministers and knowing that if defendant did not succumb to their demands she risked prosecution and extension of the specification to now include investigating her and her children despite the fact that first defendant and her children were not the persons specified in the first place. The State machinery which was being urged by Mrs Mwamuka to do all in its power to secure her interests was ready to act in her favour. It was in those circumstances that on the 31st May 2010 first defendant signed the distribution agreement of 1 June 2010 as she had been given a deadline of 31st May 2010 to do so or face prosecution.

It was her evidence that after signing the distribution agreement on 31 May 2010, the pressure did not stop or relent as the Specification was not lifted on the pretext that the parties had to resolve the outstanding issues pertaining to rentals and imputed dividends. She referred

to offers that were subsequently made by her agent but not accepted by plaintiff till the sum of $524 00 was reached again under duress.

She also alluded to the fact that these negotiations were on a without prejudice basis and as no agreement was concluded, such negotiations cannot be used as the agreement. She further testified that throughout this episode she was faced with a situation where her husband had been killed by armed robbers and such perpetrators were not arrested and the very Ministry responsible for the police was now pressurising her to settle what it deemed dues to estate Late Mwamuka and seemed oblivious to her grieving status. This made her extremely vulnerable.

As regards the correspondence between Mr Cooper and Mr. Gwaradzimba which plaintiff referred to as indicative of proper negotiations, the first defendant alluded to the fact that all this was done under duress as they were trying to get the Specification lifted. The negotiations were in any case done on a without prejudice basis and when the specification was not lifted the negotiations ended without the parties reaching agreement. In the meantime she had engaged in a parallel process for the revocation of the specification order by the High Court.

The first defendant also referred to the letters by plaintiff to the Ministry of Home Affairs urging the authorities to apply pressure on her so that she yields to plaintiff's demands. These letters were copied to high profile officials including the President of Zimbabwe.

It was as a consequence of such pressure that first defendant stated in para 23 of her founding affidavit in HC 1804/12 (urgent chamber application) that it was:-

> "under this undue influence and coercion that the distribution was eventually entered into and signed between the estate Late Vernon Mwamuka and Estate Late EE Mercuri on the 1st June 2010…. The agreement was entered into pursuant to the directives of first and second respondents."

Regarding the negotiations that culminated in what plaintiff now alleged was an agreement of April 2012, the first defendant contended that those negotiations were equally under duress and not done freely and voluntarily. She alluded to plaintiff's letter dated 1 December 2010 to the Ministry of Home Affairs and copied, as before, to high profile offices urging the authorities to continue applying pressure on her even after the 2010 agreement. Her evidence was to the effect that even her agent was placed under duress and so there could not have been any agreement. In any case the agreement was never concluded as she successfully sought the setting aside of the Specification Order at the High Court.

The first defendant also alluded to a number of other correspondence containing threats of continued specification if she did not accede to plaintiff's demands; these included threats of arrest and prosecution of her and her children. She was thus placed under tremendous pressure hence negotiations were not freely and voluntarily conducted.

As regards the offers and counter offers made during the negotiations, it was her evidence that these were on a without prejudice basis and so cannot be used against her in as far as no agreement was eventually reached. In any case her main purpose was to have the specification lifted as it was causing untoward suffering to her and the family and also to avoid the threatened prosecution and inclusion of her children in the investigations.

Mr David Maxwell Cooper gave evidence for the first defendant. His evidence was to the effect that when he got involved in the issues between plaintiff and the first defendant he noted that though the partnership terminated in 2001 by the death of V N Mwamuka, the affairs of the partnership had not been wound up. The partnership accounts he noted, which ought to have been used in the winding up, were prepared by a Mr. Gwanzura of S G and Company Chartered Accountants. These financial statements were for the year ended 31st December 2001 but were only prepared in March 2006. It was his evidence that when he engaged in negotiations with Mr Gwaradzimba these statements should have been the basis for their negotiations and if there was to be conversion of the currency from Zimbabwe dollars to United States dollars, the figures in these statements were supposed to be the starting point. Unfortunately this was not so as the plaintiff, through Mr Gwaradzimba, wanted different considerations. He also testified that the distribution agreement of 1 June 2010 was concluded under the threat of prosecution of the first defendant if she did not come to a conclusion. It was with this threat hanging over her head that she asked him to conclude that aspect. The threat was also extended to him as agent of the first defendant. As far as he was concerned, therefore, there was no free will on the part of the first defendant. The first defendant had to meet the deadline of 31st May 2010 set by the co-Ministers in their letter of 15 March 2010.

On the outstanding issues leading to further negotiations between him and Mr Gwaradzimba, the witness was categorical that this was done under duress due to the Specification that continued to operate adversely against the first defendant and the fact that the co- Ministers had made it clear that specification and investigations would be extended to the first defendant and her children. The inclusion of the children had an extremely disconcerting effect on the first defendant. He further stated that the circumstances of the negotiations were such that there was no free will on their part. They thus ended up negotiating

on such items as imputed dividends when it was clear from the financial records that no dividends had been declared by the companies in which the partnership had interests. Equally the rate of interest was also something he found himself hamstrung to contest.

The other aspect the witness alluded to was the fact that by virtue of the specification the companies from which the terminated partnership would have gotten dividends were adversely affected by the specification, yet the plaintiff insisted on imputed dividends as if the companies were operating normally. Further the income that plaintiff was alluding to as justifying imputed dividends was in Zimbabwe dollars and not the United States dollars plaintiff was claiming. He alluded to lower offers that had been made but which plaintiff rejected. As more pressure was applied on him and the first defendant he capitulated and arranged to meet Mr Gwaradzimba in Kwekwe to discuss the issues. It was the witness' evidence that the Kwekwe meeting did not result in a binding agreement at all. As far as he was concerned he had always made it clear to Mr Gwaradzimba that whatever they discussed was subject to his principal's approval through her legal practitioner. In that regard he referred to his e-mail of 21 June 2012 to Mr Gwaradzimba in which he stated, inter alia, that:

> "I acknowledge having received your e-mail dated June 2012 and the attached draft Deed of Settlement.
>
> I have forwarded the draft document to Mr. Austin Sibanda of Joel Pincus, Konson & Wolhulter. As I have indicated in previous correspondence with you Mr. Sibanda has been instructed to deal with the matter of the Deed of Settlement…."

It is common cause that Mr. Sibanda's response to the deed of settlement was a rejection. It is in that light that the witness maintained both in his evidence in chief and under cross examination that there was no agreement to enforce reached by the parties.

It may also be noted that the witness' testimony was in tandem with the evidence by the first defendant on the effect of the correspondence from the Ministers, and the meeting with the Ministers leading to an extension of the specification and investigation to now include the first defendant and her children. According to Mr. Cooper, the first defendant was extremely concerned and worried by such extension.

The net effect of Mr Cooper's evidence was that the parties did not reach final agreement and so the without prejudice correspondence exchanged cannot be used against the first defendant. In any case, even the without prejudice correspondence and discussion were conducted under a cloud of duress on the part of the first defendant.

Analysis

In the analysis of the evidence adduced it is imperative to firstly address the preliminary points raised by counsel for the parties in their closing submissions. These comprised issues of the citation of the parties, prescription and breach of section 10 of the Prevention of Corruption Act.

Mr *Matinenga* for the plaintiff averred that the issue of incorrect citation of plaintiff was ably dealt with when this court granted an amendment in HC8899/13/ (HH168-15) wherein the summons and declaration in HC 13277/12 were amended to now reflect Margret Chiwimbiso Mwamuka (in her capacity as executrix of Estate late Vernon Nathaniel Mwamuka) as plaintiff in place of AFARAS Mtausi Gwaradzimba. He argued that in view of this amendment the initial description of plaintiff did not in any way affect the plaintiff's action against the defendant nor the efficacy of the distribution account. In this Counsel did not seem to address the real bone of contention. Whilst accepting that an amendment to these proceedings was indeed granted substituting Mr Gwaradzimba's name with that of Margret Chiwimbiso Mwamuka, that did not go so far as to make amends to the distribution agreement of 1 June 2010 which still retained Afaras Mtausi Gwaradzimba (in his capacity as the Executor Dative of Estate late Vernon Nathaniel Mwamuka).

It is in that respect the Mr *Mpofu* for the first defendant contended that the agreements claim to have been concluded by Mr Gwaradzimba in his capacity as executor when he was not the executor. It is clear from the evidence adduced that Mr Gwaradzimba was never appointed executor. However upon being given a power of attorney to act as Margret C Mwamuka's agent in her capacity as executrix, he clothed himself with the title of executor. This was clearly wrong. The evidence clearly showed that he was only appointed as agent.

It is trite that a duly appointed executor is the lawful legal representative of a deceased estate. Such an executor may authorise some other persons to carry out some or all of his/her functions on his/her behalf. The executor is however not allowed to abdicate his duties. See *Shata & Anor* v *Manase N O & Anor* 2003(1) ZLR 181(H) and *Bramwell and Lazar NNO* v *Laub* 1978(1) SA 380(T).

In *casu*, the duly appointed executrix did not abdicate her duties but merely appointed Mr Gwaradzimba to be her agent as per the Power of Attorney. Unfortunately the agent for reasons best known to himself began presenting himself as the executor. I am of the view that it was evident that all the parties knew that Mr Gwaradzimba was negotiating on behalf of Margret C Mwamuka who was the duly appointed executrix. In that vein no prejudice was

occasioned by the misrepresentation. I am inclined not to treat the misrepresentation as fatal in the circumstances of this case.

Prescription

The first defendant's counsel averred that the evidence showed that the April 2012 negotiations were aimed at the pursuit of perceived obligations which arose on 30 December 2001 when V N Mwamuka died and the partnership terminated by operation of law. Thus by the time plaintiff tried to enforce the obligations a period of 3 years had lapsed and so the claim had prescribed. The plaintiff's counsel on the other hand contended that the claim had not prescribed as plaintiff could only lay claim once she had known of the dissolution of the partnership and accounts had been prepared in this regard.

Prescription is a defence to a debtor where the creditor has taken a supine attitude and not prosecuted his/her claim generally within three years of having been aware of the existence of the claim. The general principles regarding prescription were aptly set out by PATEL J (as he then was) in *Mukahlera* v *Clerk of Parliament and Ors* 2005 (2) ZLR 365 (H) at 368 E-F as follows:

> "In terms of section 15(d) of the Prescription Act [*Chapter 8:11*], the period of prescription applicable to debts generally is three years. Section 16(1) provides that prescription commences to run 'as soon as a debt is due'. The word 'debt in this context encompasses anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise. (See s2 of the Act). By virtue of s 16(3), a debt is not deemed to be due 'until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arise."

In *casu*, it is trite that upon the death of V N Mwamuka on 30 December 2001, the partnership terminated. It was then incumbent upon the surviving partner to wind up the affairs of the partnership by attending to the preparation of the partnership accounts in order that each partner is apportioned his/her dues in terms of the partnership agreement. The position was aptly stated in Bamford, *The Law of Partnerships and Voluntary Associations in South Africa*, 3rd ed at p 75 wherein the learned author stated that:

> "Unless there is an agreement to the contrary, a partnership dissolves on the death of a partner. The surviving parties to the partnership agreement do not continue as partners, and have the right to wind up the partnership.
>
> Although the liquidation of the partnership is in the hands of the surviving parties, and the executor of the deceased partner cannot interfere with the liquidation, this does not relieve the executor of the duty of administering the deceased's estate with all due diligence; one of his duties is to require accounts from the liquidator of the partnership business."

In *casu*, it is common cause that upon the late V N Mwamuka's death the surviving partner Mercuri did not wind up the affairs of the partnership. He passed on before winding up the affairs of the partnership despite the fact that a Mr. Gwanzura had prepared partnership accounts in March 2006 for such purpose.

It is common cause that in terms of the partnership agreement, each partner was entitled to a 50% share in the partnership assets and liabilities. In order to be able to claim its share, such assets or liabilities must be known after the winding up of the partnership affairs and the executrix of the estate late Mwamuka needed to have been appointed. Thus for Mrs Mwamuka to have laid a claim upon her appointment as executrix on 28 July 2004 she needed to know the material facts of the dissolution of the partnership. In this regard she requested for the accounts of the partnership but the late Mercuri would not provide as he had not wound up the partnership business.

I am inclined to accept that extinctive prescription could only start to run against plaintiff when she was appointed executrix and after she became aware, as executrix, of the facts from which her claim against first Defendant would successfully be formulated and prosecuted. See *Peebles* v *Dairiboard Zimbabwe (Pvt) Ltd* 1999(1) ZLR 41(H) and *Gericke* v *Sack* 1978 (1) SA 821(A). It is my view that in the absence of the winding up of the partnership or disclosure by the late Mercuri of the extent of the partnership assets and liabilities, plaintiff would not have been able to lay any sustainable claim. In the circumstances to hold that the plaintiff's claim is prescribed would be a travesty of justice as there were no dissolution accounts and this would be an approval of the late Mercuri's conduct of failing to wind up the partnership affairs as legally required. In my view prescription in such circumstances should begin to run upon the winding up of the partnership as that is the point plaintiff would have acquired knowledge of all the facts relevant to prosecute her claim.

Breach of s 10 of the Prevention of Corruption Act.

Counsel for the parties also argued on whether in the negotiations leading to the alleged 2012 agreement there was a breach of s 10 of the Prevention of Corruption Act, in that negotiations affecting specified persons were conducted without obtaining the consent of the investigator as required by s 10(2). I am of the view that nothing much turns on this issue as it was common cause that the specified person, the late Mercuri, was no more. The plaintiff and the first defendant were not specified at all and were only acting in their capacities as executrixes of their late husbands' estates. Theirs was to wind up the estates in terms of the Administration of Estates Act.

It may also be noted that the negotiations involved all the players including the investigator, co-Ministers of the Ministry responsible for specification and the agents of the parties. Thus not only was the investigator aware of the purported negotiations but he was also involved as noted from the correspondence tendered into evidence. His views and recommendations were taken aboard by the co-Ministers in their directives to the first defendant. The investigator having been an integral part to all this, there would have been no need to seek consent over something he was part to.

I am however of the view that the continued specification of the Late Mercuri in his death and the Partnership Mwamuka, Mercuri and Associates, after its termination was an abuse of a legal process intended to unlawfully force or coerce the first defendant to give in to plaintiff's demands even though such demands were not being pursued in terms of the law on the dissolution of partnerships and the administration of deceased estates. As is common cause upon approaching court the specification was revoked. This should thus not be much of a debate.

From the evidence adduced I am of the view that the major issues for determination pertain to the validity of the 2010 agreement and whether any agreement was concluded in 2012, if so whether such agreement is valid or not.

In as far as duress is alleged in respect of both the agreement of 2010 and the purported agreement of April 2012; it is pertinent to analysis the circumstances of the negotiations leading to each agreement as testified to by the witnesses

As already alluded to above the first defendant testified that she was pressurised /coerced into the agreement of June 2010. Amongst the correspondence she referred to as proof of such duress is the letter of 6 April 2010 from The Permanent Secretary of the Ministry of Home Affairs to the first defendant's legal practitioners. That letter states, *inter alia*, that specification will not be lifted until the specified persons comply with the Minister's directives in these words:

> "It is the co-Ministers wish that the matter is put to rest as soon as possible and that Mrs. P Mercuri is advised accordingly. It would appear that Mrs. Mercuri is unwilling to have the specification lifted by dilly dallying and pontificating on straight forward outstanding issues. Please be advised that the law is clear on who has a say on issues to do with specifications and the de-specification will not be possible until the companies comply with the ruling of the co-Ministers. The co- Ministers will not entertain any further time wasting tactics by Mercuri."

The letter further states that:

> "You are also accordingly advised that the fees of the investigation should be shared between the estates of Mercuri and Mwamuka on the basis of 30% Mwamuka and 70% Mercuri since

> out of the 16 years of the Partnership Mercuri had 7 years acted as the only partner and abused the trust.
>
> In conclusion, I wish to draw to your attention that subject to the Ministers' directive being implemented and the specified persons having paid what is due to the estate of Mwamuka and the partnership being dissolved, will the de-specification be effected. The co- Ministers stand guided by the Prevention of Corruption Act(chapter 9:16) and any delay after 31st May 2010 may lead to prosecution as the matter will be referred to the Attorney General's office."

It is pertinent to realise that the specified persons were the late E E Mercuri and the Partnership Mwamuka Mercuri and Associates yet *in casu*, Mrs Mercuri was being threatened with prosecution.

As E E Mercuri had died and the partnership had terminated it follows that there was no person effectively under specification. The co-Ministers nevertheless opted to harass the first defendant as if she was the specified person. Equally none of the companies the partners had interests in had been placed under specification yet in the above letter reference is made to those companies as if they were specified.

The above letter containing the threats was copied to, *inter alia*, The Attorney-General, The Police Commissioner General, The Acting Principal Director- Anti-Corruption and Anti - Monopolies and Mrs Mwamuka

The net effect of this was to apply pressure on the first defendant to comply with unlawful directives, as the specified person was no more. The first defendant had to comply by 31st May 2010 or else she faced prosecution for as yet an undisclosed offence. It was in those circumstances that the distribution agreement was entered into and signed by first defendant on 31 May 2010 in an effort to beat the deadline and by Mr Gwaradzimba on 1 June 2010.

Though Mr Gwaradzimba made effort to say that he had not been aware of this letter as he negotiated with Mr. Cooper, he nevertheless conceded that the letter was improper in the circumstances.

It is pertinent to note that the above letter was preceded by the co-Minister's directives to the Investigator in a letter dated 23 July 2009 in response to the investigator's report. In that letter the co-Ministers determined, *inter alia*, that:

> "b) As the surviving widows of Mercuri and Mwamuka are the Executrices, the existing assets shall be valued by an independent valuer appointed by the Executrices with the assets of the partnership being shared on a 50-50 basis. This also includes the US$60 000 received for work done at Africa University with interest being due to Mwamuka estate from the date of payment of their share of the US$60 000. Rentals due to the Mwamuka estate is based on that received by the jointly owned properties from January 2002 to date and any resultant dividend will be based on a 50-50 consideration.

> c) Financial statements for the partnership shall be based on information supplied by Euginio Mercuri for the year ending 31st December 2002 to December 2007 for the various companies making necessary adjustments for inflation.
>
> d) The dissolution of the partnership shall be prepared as at 16th March 2008 the date of Euginio Enrico Mercuri's death which shall be the date used for the dissolution of assets of the Partnership. The fees of the investigator shall be shared between the estates of Mercuri Mwamuka on the basis of 30% Mwamuka and 70% Mercuri.
>
> e) Once these remedies and stages have been implemented and the specified persons have paid what is due to the estate of Mwamuka, the partnership can then be immediately dissolved. Thereafter the specified persons can approach the Minister of Home Affairs for de-specification."

The co-ministers determination was contrary to the law as the partnership was dissolved by operation of law on the death of VN Mwamuka and after 30 December 2001 there was no partnership to talk about yet they directed that the dissolution of the 'Partnership' accounts shall be prepared as at the date of death of E E Mercuri on 16 March 2008. They also determined the sharing ratio of the investigator's fees contrary to the provisions of s 7 of the Act and the partnership agreement on sharing of costs. The Ministers were in effect acting as if they were the liquidators of the partnership affairs when that was not so.

It was in compliance with such unlawful directives that the negotiators were goaded into coming up with the 2010 distribution agreement. They had to do it in such a way as to appease the Ministers lest the specification will not be lifted and the first defendant will continue to suffer under the adverse effects of specification.

As regards the purported agreement of April 2012 the first defendant contended that the negotiations were preceded by a continuation of the coercion and undue pressure brought to bear upon her during the purported negotiations.

It is pertinent to note that in furtherance of pressure on the state machinery to goad the first defendant into compliant with the unlawful directives, on 1 December 2010 the plaintiff wrote a letter to the Permanent Secretary, Ministry of Home Affairs in which she sought further pressure to be applied on the first defendant for what she perceived to be reluctance on the part of the first defendant to resolve outstanding issues. After chronicling her perceived difficulties she proceeded to state that:

> "It is because of all the above that I have taken the liberty to copy the President. My hope is that out of respect for the President, Mrs. Mercuri will cooperate, failing which, I pray that between your office and the President's office, pressure can be put on Mrs Mercuri to cooperate in resolving the outstanding issues.
>
> Mrs Mercuri is a thoroughly evil woman devoid of any sense of morality. As can be gleaned from the above, I have done all that is humanely possible."

That letter was followed by another letter from the plaintiff to the same Permanent Secretary dated 13 January 2011 in which she made reference to the Ministry's letter to the first defendant's legal practitioners dated 14 December 2010. After outlining what the outstanding issues which the first defendant may not have respondent to within the given 10 days, Mrs. Mwamuka proceeded to state that:

> "In short, Mrs. Mercuri has to date chosen to IGNORE all issues regarding the SPECIFICATION.
>
> This shows that like her husband before her she is thoroughly evil and has total disdain for the JUDICIARY and the STATE.
>
> We are now in the tenth (10^{th}) year since Late VNM passed on, and we cannot continue exchanging letters to no avail and treating Mrs Mercuri with kid gloves.
>
> I am appealing to yourselves to use whatever powers are vested upon you by the STATE to help the beneficiaries of Estate Late VNM to get out of this nightmare."

These letters were followed by threats from the co-Ministers of Home Affairs to the first defendant of extending the appointment of the investigator with instructions for him to investigate and report on any assets which Mr Mercuri, Mrs Mercuri and their children may have purchased after the death of Mr Mwamuka. See letter of 15 March 2012. This letter came hard on the heels of a meeting the co –Ministers had held with the parties on that same day during which meeting the Ministers had asked Mrs Mercuri's legal practitioner not to partake in the meeting and ordered him to go out. After their brazen conduct the co-Ministers had then proceeded to ask first defendant to make an offer. When she could not, as she asked for time to consider what offer to make if any, the letter extending the investigator's mandate was then authored.

Subsequent to this the first defendant apparently made an offer which was rejected by Mr Gwaradzimba as noted in his letter of 23rd March 2012 to the first defendant's Legal practitioners wherein in para 5.2 he stated that—(p134 plaintiff's bundle-)

> "I note that your client's offer of US$144 000.00 was pursuant to the directive given by the Honourable Co- Ministers of Home Affairs at the round table meeting convened in Harare on 15 March 2012. Without this directive, it would suggest, your client was not going to be willing to compensate estate late VNM, despite the clear unfairness that has taken over ten (10) years to be addressed. Without the honourable Co-Ministers' intervention, your client(from your advice) were going to conveniently forget that they co-owned properties through jointly owned companies, which properties earned rental income since 2002 until 31 January 2009, which rental income in its entirety was at the disposal of late E E Mercuri at the expense of estate late VNM."

The letters were copied to all the critical executive authorities including The President of the Republic of Zimbabwe, co-Ministers of Home Affairs, The Attorney General, The Police Commissioner General etc.

When the contents and impact of the above letters were brought to the attention of Mr Gwaradzimba under cross examination, he conceded that the above pressure was improper. He just could not be bold enough to accept that it affected the first defendant's will to freely and voluntarily negotiate.

Under cross examination Mr Gwaradzimba confirmed that when he wrote the letter of 23 March 2012 para 5.2 he knew that an offer of US$144 000 had been made but it was not accepted hence the higher offer of $524 000.00 had to be made. It was this new 'offer' that plaintiff now sought to claim as an agreed debt. The following exchange under cross examination by the first defendant's legal practitioner is illustrative of this point-

"Q. by the way you are claiming $524 000.00?

A. yes. It shows that this was an offer which we could not accept.

Q. my question is it shows the distance which the 1st defendant had to travel?

A. yes

Q. This offer was made pursuant to a directive?

A. yes

Q. the directive was issued by the Co-Ministers? A. indeed.

Q. You are an experienced Chartered Accountant you know that Co-Ministers have nothing to do with how estates are wound up, correct?

A. yes, but this is an extra ordinary circumstance which should not have happened in this way.

Q …….

Q. These Ministers who must not issue directives call parties to a round table meeting in Harare on the 15th March 2012? A. yes

Q. And in obedience to that directive an offer is made? A. yes

Q. it is this offer that you have built up on? A. yes.

Q. Up until you have come to $524 000? A. indeed.

Q. You said without the issuance of this directive, no offer was going to be made? A. yes that is what I said.

Q. So you understood Mrs. Mercuri's position?

A. But they did not want to compensate estate late Mwamuka. That is what I understood despite the fact that they had actually told me they wanted to do it.

Q. They did not want to compensate and now they are doing it because directives are being issued? A. Yes

Q. And that is what you call a proper negotiation? A. what do you mean?

Q. Where a party negotiates, makes offers because the Ministers have issued a directive?
A. No, that is not the basis upon which we made the claim.

Q. So yourself, you knew that Mercuri was under pressure? A. Yes I know they were under the pressure because of the Ministers' involvement.

Q. When you were asked by my learned friend yesterday whether Mr. Cooper showed any sign of being under pressure and you said you never did? A. yes

Q. So you were not telling the truth? A. I was telling the truth.

Q. Now you are telling us that you knew that Mercuri was under pressure?

A. I am saying because of that Mercuri was under pressure. But I am saying in my negotiations with Mr. Cooper he never showed that he had any such pressure. ……" (see pp 54-55 transcript of record of proceedings)

The above exchange confirms that the first defendant was under immense pressure to yield to the demands of the plaintiff. The pressure was also applied to first defendant's agents. Mr Gwaradzimba clearly conceded that even the lawyers were under such pressure. Though he tried to exclude Mr. Cooper from such pressure, it was clear that such pressure extended to Mr. Cooper as well even from the witness' evidence. Mr. Cooper as the negotiator was equally affected.

I am of the view that the rest of the Mr Gwaradzimba's evidence did not dilute or lessen the pressure brought about by the specification, conduct of the plaintiff and the Ministers' involvement.

It was in these circumstances that the first defendant stated that she negotiated under duress as a result of the directives by the co-Ministers of Home Affairs

Upon considering the evidence adduced it was apparent to me that the circumstances the first defendant found herself in were not conducive for free and voluntary negotiations. The various aspects of intimidation or pressure and threats of continued specification leading to continued difficulties in accessing money for survival, threats of prosecution and the prosecuting authority copied such letters and also the threat of extending the specification and

investigation to the first defendant and her children worked against the first defendant's will to freely and voluntarily negotiate the terms of the agreement with plaintiff.

Despite the above evidence plaintiff's counsel averred that a valid agreement was reached by the parties whilst the first defendant's counsel contended that no agreement was reached. The reasons for so contending included that – the negotiations were all conducted on a without prejudice basis; the negotiations did not yield a signed agreement which both parties accept as a *sine qua non* to the existence of any binding obligations; the draft document plaintiff sought to rely on was rejected by the first defendant's legal practitioners.

Counsel for first defendant averred that the negotiations were indeed conducted under duress and so could not have yielded any valid agreement or contract.

Duress may be defined as compulsion by use of force or threats. The act must be unlawful.

In order for an agreement or contract to have been reached and to be valid, it is trite that there must be a meeting of the minds of the parties thereto. Such a meeting of the mind must be freely and voluntarily exercised.

In *Muzengi* v *Standard Bank & Anor* 2000 (2) ZLR 137(H) this court held, *inter alia*, that:

> "In *Steiger* v *Union Government* (1919) 40 NLR 75, the plaintiff claimed that he had been forced to resign and therefore his resignation was tantamount to unlawful dismissal. The court held that where a plaintiff seeks relief on the ground of *metus causa*, the material circumstances giving rise to the fear should be clearly and distinctively averred. At p 79-80, Dove –Wilson JP said-
>
> 'Force and fear will annul an engagement when the fear is not vain or foolish, but such as to overcome a mind of ordinary firmness. The true ground of the annulment is extortion through the influence of fear induced in various ways, and it is really a question for the court or jury whether in all the circumstances the consent was in fact extorted by coercion. It is therefore very necessary that the material circumstances giving rise to the fear should be clearly and distinctively averred. …."

Equally *in International Export Trading Company Zimbabwe (Pvt) Ltd* v *Edmore Taperesu Mazambani* HH 195/17 at p 4-5 of the cyclostyled judgement the essence of duress was outlined as follows:

> "R H Christie in his book *Business Law in Zimbabwe* 2011 ed at 82-3 says the following on duress:
>
> 'A contract obtained by force or by fear induced by threats of force obviously cannot be allowed to stand, but because of the infinitely variable nature of force, fear and threats the limits of this principle require careful attention. The fear must be such as would overcome the resistance of a person of ordinary firmness, taking into account the sort of person the victim is (e.g. young or old woman).

> The author goes on to state that the threat must be of an imminent or inevitable evil. In *Broad Tyk v Smuts* 1942 TDD 47 @ 52 the court held that the threat must be directed at the party or his family. In *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298(c) @305, the court said the following of duress,
>
> 'it is clear that a contract may be vitiated by duress(*metus),* the reason *d'etre* of the rule apparently being that intimidation or improper pressure renders the consent of the parties subject to duress not true consent…… Duress may take the form of inflicting physical violence upon the person of a contracting party of inducting in him a fear by means of threats."

The case outlines the following as requisites of threats constituting duress:

1. The fear must be a reasonable one;
2. It must be caused by the threat of some considerable evil to the person concerned or his family;
3. It must be the threat of an imminent or an inevitable evil;
4. The threat or intimidation must be unlawful or *contra bonos mores*
5. The moral pressure must have caused damage"

See also *Botha & Anor v Barret* 1996 (2) ZLR 73(S)

Although the effect of duress is to render the contract voidable at the option of the party threatened, duress by a third party entitles the party threatened to resile from the contract.

It may also be said that outside the strict sphere of contract the same reasoning applies to misuse of official power such as were such power is used to unlawfully subjugate the free will of another. See *Rex* v *Mutimba* 1944 AD 23.

In *casu,* the question is whether the first defendant has placed before the court sufficient evidence which shows that under the circumstances of the matter, the resolve of a woman in the standing of first defendant would have been broken. The test takes into account the sort of person the victim is.

I am of the firm view that the first defendant has indeed shown on a balance of probabilities that she was induced by force of fear and threat to engage in the negotiations leading to the agreement of 2010 and the continued negotiations leading to the draft agreement of 2012. But for the unlawful pressure defendant would not have entered into the conclusions purportedly reached in this case. The plaintiff was well aware of such pressure on the first defendant as she was the instigator of it. She thus lay in wait for the fruits of the process of applying pressure and undue influence on the first defendant she had initiated through the apparatus of the STATE.

My understanding of the plaintiff's counsel's argument against such a finding was that the negotiators on behalf of both estates were chartered accountants and entities engaged to

assist such as Ernest and Young and Knight Frank and Rutley were independent professional bodies who acted independently of the State machinery put at play by plaintiff. He thus averred that the negotiations were done properly without any duress or undue influence.

Unfortunately, it was common cause that all these actors were required to operate within the strictures of terms of reference provided by the co- Ministers of Home Affairs. The negotiators were fully aware of the tremendous pressure brought to bear upon this grieving widow which included threats of prosecution and that the first defendant was desperate to avoid such prosecution. This is a scenario where the so called negotiations were aided by the unfair position first defendant found herself in. It cannot therefore be said that the first defendant made offers or concessions out of her free will.

Whilst it is indeed true that the late Mercuri may not have acted timeously to wind up the affairs of the partnership, such failure was no reason to coerce the first defendant into such negotiations. In any case, partnerships are not dissolved under the Prevention of Corruption Act but by the appointment of a liquidator. Where the remaining parties are not agreed on a liquidator they have every right to approach court for the appointment of such a liquidator. This is a course plaintiff ought to have taken upon realising that the late Mercuri was not forthcoming on the issue of partnership accounts or, after his death, that Mrs Mercuri was not forthcoming in this regard. I am thus of the view that the partnership affairs must be wound-up by a properly appointed liquidator.

In the circumstances the plaintiff's claim cannot succeed. The first defendant's claim succeeds to the extent requiring the appointment of a liquidator in terms of the law and the winding up of the estates to be done in terms of the Administration of Estates Act.

Costs

After considering the circumstances of the case it is clear that both estates have some measure of blame to take in the manner in which the root cause of the dispute turned out to be. The plaintiff was made to take acts of desperation by approaching state authorities by the failure of the late Mercuri to do that which he was expected to do in winding up the partnership. This is a case where each party must bear their own costs.

Accordingly it is hereby ordered that:

1. The plaintiff's claim be and is hereby dismissed with each party to bear their own costs.

The 1st defendant's counter- claim be and is hereby granted in the following terms;

1. The distribution agreement dated 1st June 2010 between the parties be and is hereby declared null and void as it was induced by duress.
2. It is hereby declared that no valid agreement was entered into by the parties in respect of the sum of USD524 000.00.
3. Any transfers or change of registration of ownership executed in pursuance of any purported agreement in settlement of the dispute between the estate late Mercuri and Estate late Mwamuka be and are hereby reversed subject to a proper winding up of the partnership to be undertaken by a mutually agreed liquidator failing such agreement, a liquidator to be appointed in terms of the law at the instance of the parties.
4. The Plaintiff and the 1st defendant shall within 30 days of this order appoint a mutually agreed liquidator to wind up the partnership affairs. Should they fail to agree on such either party shall approach court for the appointment of such a liquidator in terms of the applicable law on the dissolution of partnerships and the Administration of Estates.
5. Each party shall bear their own costs of suit.

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners
Joel, Pincus, Konson & Wolhurter, First defendant's legal practitioners